LEE CHENG YIN T/A PERNIAGAAN JIA ZING TEN

v.

MBF FINANCE BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[APPEAL NO: 1-12-19-2004]
17 JUNE 2005

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Application to set aside judgment in default - Whether there was inordinate delay in filing application before sessions court - Subordinate Courts Rules 1980, O. 29 r. 14 - Whether contravened - Failure to file a draft statement of defence - Subordinate Courts Rules 1980, O. 14 r. 18(1)(a) - Whether there was a defence on the merits*

HIRE PURCHASE: *Hire purchase agreement - Hire Purchase Act 1967 - Goods vehicle maximum laden weight exceeding 2540kg - Whether outside ambit of item 2(d) of First Schedule to the Hire Purchase Act 1967 - Whether provisions of Hire Purchase Act 1967 applicable*

This was an appeal filed by the appellant/defendant ('the defendant') against the decision of the sessions court judge dismissing her application to set aside the judgment in default obtained against her. It was submitted for the defendant that she had not executed the hire purchase agreement ('the agreement') and alleged fraud as a triable issue. The issues that arose were (1) whether there was inordinate delay on the part of the defendant in filing the application before the sessions court; (2) whether there was a defence on the merits for the court to set aside the judgment in default and (3) whether the provisions of the Hire-Purchase Act 1967 ('the Act') apply.

Held (dismissing the appeal with costs):

[1] There was an unexplained delay of five years and eleven months on the part of the defendant in filing the application before the sessions court, in contravention of O. 29 r. 14 of the Subordinate Courts Rules 1980. It constituted an ordinate delay which is detrimental to her application. (pp 483 c & 484 c)

[2] The defendant had not filed a draft statement of defence. The issues of fraud and forgery raised for the defendant must be specifically pleaded by the defence under O. 14 r. 18(1)(a) of the Subordinate Courts Rules 1980. There was absolutely no averment by the defendant for the court to consider and determine the merits *viz* whether there was any reasonable, probable or *prima facie* defence or otherwise.The defendant's affidavit did not support the alleged fraud and forgery in relation to the agreement and so did not constitute a defence on the merits. (p 485 c, e)

[3] Regarding the defendant's contention that the plaintiff had to mitigate the losses by disposing off the vehicle as the agreement was subject to the Hire-Purchase Act 1967 ('the Act'), this issue may be resolved by determining whether the vehicle is subject to the Act. The certificate of registration showed that the vehicle is a goods vehicle whose maximum permissible laden weight is 4500 kilograms, and hence exceeded the threshold of 2540kg and is outside the ambit of item 2(d) of the First Schedule to the Act in which case the provisions of the Act would not apply. (p 486 a-b)

Case(s) referred to:

Abdul Latif Mohamed Ibrahim v. International Factors Leasing Pte Ltd [2001] 2 CLJ 140 CA ***(refd)***

Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors [1989] 1 CLJ 912; [1989] 1 CLJ 444 HC ***(refd)***

Evans v. Bartlam [1937] AC 473 ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC ***(refd)***

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1994] 1 CLJ 329 SC ***(refd)***

Hong Leong Finance Bhd v. Lee Cheng Heng t/a Lee Cheng Heng Earthworks & Anor [1987] 2 MLJ 266 ***(refd)***

Kesang Leasing Sdn Bhd v. Mohd Yusof Ismail & Anor [1989] 2 CLJ 1216; [1989] 1 CLJ (Rep) 671 HC ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Kwong Yik Bank Bhd v. Sa'adiah Mastan [1994] 3 CLJ 781 HC ***(refd)***

MBf Finance Bhd v. Sim Peng Bee & Anor [2003] 1 CLJ 690 HC ***(refd)***

MBf Finance Bhd v. Ting Kah Kuong & Anor [1993] 3 CLJ 492 HC ***(refd)***

Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd [2003] 4 CLJ 533 CA ***(refd)***

Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor [2003] 6 CLJ 326 HC ***(refd)***

Tan Chiang Brother's Marble (S) Ptd Ltd v. Lightweight Concrete Sdn Bhd [1997] 4 CLJ 759 HC ***(refd)***

Tan Ooi Chee & Anor v. Kanching Realty Sdn Bhd [1989] 1 MLJ 519 ***(refd)***

Legislation referred to:
Hire-Purchase Act 1967, Item 2(d), First Schedule
Reciprocal Enforcement of Judgments Act 1958, s. 5
Rules of the High Court 1980, O. 42 r. 13, O. 67
Subordinate Courts Rules 1980, O. 14 r. 18(1)(a), O. 29 r. 14

For the plaintiff - Mohamed Musthafa; M/s Abdul Aziz Rahim & Co
For the defendant - Mathews George; M/s Danaraj Mathews Jimmy & Sara

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal filed by the appellant/defendant ("the defendant")(F) against the decision of the learned sessions court judge who had on 2 April 2004 dismissed her application to set aside the judgment in default obtained against her on 27 February 1998.

Factual Background

The defendant's affidavit in support averred that in April 1998, she knew of the plaintiff's claim against her when she was served a copy of the judgment in default *vide* letter dated 14 April 1998 issued by the plaintiff's solicitors. She then wrote a letter dated 8 June 1998 to the plaintiff, disputing the plaintiff's claim, on the ground that she has not agreed to nor was she aware of the subject matter herein ie, the hire purchase agreement ("the agreement").

The defendant has also applied for and obtained from the plaintiff a copy of the application form for the hire purchase facility. *Vide* letter dated 15 June 1998, the plaintiff's branch manager informed the defendant that the agreement has been given to her uncle one Lee Chuk Liang.

Vide letter dated 30 July 1998 to the plaintiff, the defendant stated that the signature of the applicant in the application form was not hers, alleging that it has been forged by her uncle. The defendant has on 18 September 2003 lodged a police report.

In September 2003, the defendant through her sister in Tangkak received a copy of the plaintiff's letter dated 13 August 2003 informing the defendant that the plaintiff has commenced bankruptcy proceedings against her.

The defendant alleged that she has not received most of the letters addressed to her in Tangkak as she has not been staying there since 1997.

The defendant alleged that as the plaintiff has made the cheque in the sum of RM21,187.92 payable to her uncle, she has a defence to the plaintiff's claim.

On the other hand, the plaintiff's affidavit in reply, affirmed by the head of credit control, raised a preliminary objection that this application has been made out of time.

In addition, the plaintiff averred that:

1. the defendant was aware of and has agreed to become the hirer by executing the agreement;
2. the defendant had also received notice of the hire purchase transaction after payments had been released, whereupon the defendant called and informed the plaintiff's representative one Mr. Gan that she (the defendant) would discuss with her uncle;
3. the defendant had never informed the plaintiff of the change of her address from Tangkak to Johor Bahru; and
4. the defendant's report to the police on 18 September 2003 ie, five years after the judgment had been obtained against her in 1998, made no mention of her uncle who has allegedly forged her signature.

Delay In Filing Application

Mr. Mohamed Musthafa, plaintiff's learned counsel, submitted that there was an unexplained delay of five years 11 months on the part of the defendant in filing the application before the sessions court, in contravention of O. 29 r. 14 of the Subordinate Courts Rules 1980 ("O. 29 r. 14"). Support was sought in:

1. *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396;
2. *Abdul Latif Mohamed Ibrahim v. International Factors Leasing Pte Ltd* [2001] 2 CLJ 140; and
3. *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* [2003] 4 CLJ 533.

Defendant's learned counsel Mr. Mathews George did not dispute the said delay but argued that the defendant had genuinely believed that the plaintiff would not proceed with the claim against her, and that delay is not conclusive as the paramount factor is whether the defendant has a defence on the merits, referring to *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32.

I shall first consider if such delay is detrimental to the defendant's application.

O. 29 r. 14 merits reproduction as follows:

> **14 Setting aside or varying judgments and orders (O. 29 r. 14)**
>
> Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

The defendant's unexplained delay of five years and 11 months in my view clearly has run foul of O. 29 r. 14 above.

In *Khor Cheng Wah, supra*, on 9 March 1998, the respondent, Sungai Way Leasing Sdn. Bhd, entered judgment in default of defence. The appellant's summons dated 5 April 1984 to set aside the judgment was dismissed by the judge. One of the issues raised was whether there was delay on the part of the appellant in making the application to set aside the default judgment, as the appellant had placed the conduct of his defence in the hands of a solicitor who did little to protect his interest. The Court of Appeal held that it was not a reasonable explanation and hence affirmed the decision of the first instance judge.

In *Abdul Latif, supra*, the respondent had obtained summary judgment in Singapore against the appellant and that judgment was registered on 12 January 1995 in the High Court of Malaya. The order of registration was served on the appellant who was given 14 days from the service to set it aside. The appellant did not do so. On 27 January 1998 he applied for an extension of time to set aside the registration as well as the judgment pursuant to s. 5 of the Reciprocal Enforcement of Judgments Act 1958 and O. 67 of the Rules of the High Curt 1980, on the ground, *inter alia*, that he only knew of the judgment on 17 April 1997. The appellant's application was dismissed by the learned registrar. Appeals to the judge in chambers and to the Court of Appeal were also dismissed.

Where the defendants' application to set aside a judgment in default of defence was filed outside the time limit prescribed by O. 42 r. 13 of the Rules of the High Court 1980, in the absence of an explanation for the delay, as in *Ng Han Seng, supra,* the Court of Appeal in a judgment delivered by Nik Hashim JCA held that the application should be dismissed in limine and the merits need not be considered.

However in *Fira Development, supra,* judgment in default of appearance had been obtained by the plaintiff against the defendant on 7 January 1986. On 21 March 1986, the defendant filed an application for leave to enter appearance and to set aside the judgment. The first instance judge dismissed the application on 23 October 1987 on the ground, *inter alia*, that there was delay in filing the application, adding that it was not necessary for him to consider the merits of the case. On appeal, Lee Hun Hoe CJ (Borneo) (as he then was) speaking for the then Supreme Court, disagreed, holding that the court must consider the merits of the case.

Having regard to the preponderance of authorities, I am of the view that the defendant's unexplained and undisputed delay of five years and 11 months constitutes an inordinate delay which may be considered as being detrimental to her application.

Be that as it may, I shall nevertheless consider the merits of the application.

Merits Of The Application

It was submitted for the defendant that the defendant had never executed the agreement, alleging fraud as a triable issue, and so the judgment in default should be set aside, relying on *Kwong Yik Bank Bhd v. Sa'adiah bte Mastan* [1994] 3 CLJ 781.

The plaintiff's response is that the defendant has failed to show any merit as there was no draft defence. Reference was made to *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 CLJ 329; *Pengkalen Concrete Sdn Bhd v. Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 6 CLJ 326.

At this juncture, apart from the issue of delay, I would re-state the relevant principles governing the instant application, as follows:

1. A judgment in default which is irregular must be set aside *ex debito justitiae*: *Hasil Bumi SC, supra*, per Jemuri Serjan CJ (Borneo) (as he then was);

2. Where a default judgment is regular, the applicant need not prove the defence but has merely to show a defence on the merits: *Ibid*, following *Evans v. Bartlam* [1937] AC 473 HL;

3. Before a judgment in default is set aside, the court must be satisfied that there is a defence on the merits: per Suriyadi J in *Pengkalen Concrete, supra,* referring to *Tan Ooi Chee & Anor v. Kanching Realty Sdn Bhd* [1989] 1 MLJ 519;

4. The defendant must establish the existence of a defence on the merits by at least filing a draft defence: and

5. A defence on the merits means a defence which discloses an arguable and triable issue, as such defence does not have to show that there is a real prospect of success or that it has to carry some degree of conviction: *Tan Chiang Brother's Marble (S) Ptd Ltd v. Lightweight Concrete Sdn Bhd* [1997] 4 CLJ 759 at 760; quoted in *Pengkalen Concrete*.

Bearing these principles in mind, it is to be noted that the defendant's learned counsel has not filed a draft statement of defence and so the court below was unable to consider and determine the defence on merits. The issues of fraud and forgery raised for the defendant must be specifically pleaded by the defence under O. 14 r. 18(1)(a) of the Subordinate Courts Rules 1980. There was absolutely no averment by the defendant for the court below to consider and determine the merits *viz* whether there is any reasonable, probable or *prima facie* defence or otherwise.

Be that as it may, the contention that the defendant has not executed the agreement runs counter to the defendant's affidavit which merely stated that the defendant has not executed the application form.

In my view, the defendant's affidavit does not in any way support the alleged fraud and forgery in relation to the agreement and so does not constitute a defence on the merits.

Does The Hire-purchase Act Apply?

It was contended for the defendant that the plaintiff has to mitigate the losses by disposing off the vehicle as the agreement is subject to the Hire Purchase Act 1967 ("the Act"), relying on *Kesang Leasing Sdn Bhd v. Mohd Yusof bin Ismail & Anor* [1989] 2 CLJ 1216; [1989] 1 CLJ (Rep) 671; and *Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors* [1989] 1 CLJ 912; [1989] 1 CLJ (Rep) 444; *Hong Leong Finance Berhad v. Lee Cheng Heng t/a Lee Cheng Heng Earthworks & Anor.* [1987] 2 MLJ 266.

The plaintiff's response is that the agreement is not subject to the Act, seeking support from *MBf Finance Bhd (formerly known as Malaysia Borneo Finance Corporation (M) Bhd) v. Ting Kah Kuong & Anor* [1993] 3 CLJ 492; *MBf Finance Bhd v. Sim Peng Bee @ Sim Bay Bee & Anor* [2003] 1 CLJ 690.

In my judgment, this issue may be resolved by determining whether the vehicle is subject to the Act. The certificate of registration shows clearly that the vehicle is a goods vehicle whose maximum permissible laden weight is 4500 kilograms, and hence exceed the threshold of 2540 kg. and so is outside the ambit of item 2(d) of the First Schedule to the Act, in which case the provisions of the Act would not apply. Section 1 thereof provides that the Act shall apply in respect only of hire-purchase agreements relating to goods specified in the First Schedule. (See also *MBf Finance Bhd v. Ting Kah* Kuong, *supra,* per Abdul Kadir Sulaiman J (now JCA).

In *MBf Finance Bhd v. Sim Peng Bee, supra*, I held, *inter alia,* that s. 2(1) of the Act applies to agreements within its ambit but does not prohibit hire purchase agreements outside its ambit eg, where the plaintiff has given unrebutted evidence that the heavy vehicle in the agreement was not subject to the Act, to which both learned counsel had agreed.

Credit Guarantee Corporation, supra, cited for the defendant is a case concerning equipment leasing. Shankar J (later JCA) had granted the guarantor (third defendant) conditional leave to defend pursuant to an O. 14 application and so is of a different nature from the instant appeal.

In the circumstances, I am of the view that the authorities cited for the defence do not support the defendant's case.

Conclusion

I agree with and affirm the decision of the court below. This appeal is hence dismissed with costs.